

PART 11  
DESCRIBING AGENCY NEEDS

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11.002 Policy.

(a)(1)(ii)(90) Agencies are responsible for determining their requirements and the best strategy for meeting those requirements. An agency's requirement is not overly restrictive of competition as long as the agency can show that its decisions are --

(A) Based on actual experience, engineering analysis, or similar rational bases; and

(B) Rationally related to ensuring its legitimate requirements will be met.

(91) To ensure that the Government's needs are met in the most effective manner, agencies must define their requirements in terms that --

(A) Take optimum advantage of distribution and support options, methods for assuring reliability, and other capabilities available in the marketplace that the agency determines appropriate for the type of item or service being acquired; and

(B) Exclude those items or services that cannot meet the agency's legitimate requirements.

SUBPART 11.1 - SELECTING AND DEVELOPING REQUIREMENTS DOCUMENTS

11.103 Market acceptance.

(a) Approval authority for requiring offerors to demonstrate market acceptance pursuant to FAR 11.103(a) is delegated to the contracting officer.

(90) A market acceptance requirement is a requirement that an item must have performed in a certain way in a specified environment that approximates or reasonably relates to the agency's

intended application. The use of market acceptance criteria is consistent with the definition of full and open competition in FAR Part 6 as it relates to minimum needs. A market acceptance requirement may be used to establish either --

(i) A minimum threshold or performance that will be considered a demonstration that the item has been adequately market-tested or field-proven; or

(ii) An evaluation method that awards partial credit for items that meet part of the requirement.

(b)(90) Market research provides the information from which it can be determined whether previously-developed items exist that can meet the agency's needs and what methods are used in that marketplace to assure reliability. Then it must be shown, through a careful analysis of the intended application and the marketplace capabilities available, that the optimum strategy for meeting the Government's needs is to require items that have been field-proven in specified ways.

(b)(91) When an agency requires that an item must have achieved market acceptance, the agency must specify exactly what that means in the context of the particular acquisition. The meaning will vary widely, depending upon what benefit the agency is attempting to gain by using such a strategy.

(b)(92) When an agency's primary goal is to acquire the latest technology, other methods of assuring reliability are more appropriate than market acceptance. Particularly when acquiring items in a rapidly evolving technological field over a long-term contract, an agency will not be able to demonstrate that an item that is currently field-proven would be the best item for meeting the agency's needs several years from now.

(e) The preparing activity will maintain documentation that describes the technical aspects of the item and supports the market acceptance requirement.

(1) Some examples of the type of rationale that could support requiring a market -tested item include:

(90) Minimize design and engineering risk;

(91) Eliminate costly and time-consuming field-testing and debugging of complex items;

(92) Assure an item can be fielded quickly enough to meet an urgent requirement;

(93) Assure an established end item is routinely supported by spare and repair parts;

(94) Preclude untested or experimental units; or

(95) Assure compliance with Federal safety and environmental requirements.

(2) The market acceptance requirement may be whatever can reasonably be demonstrated --based on past experience, engineering analysis, market research and similar rational bases --to be an indicator that the item will meet the intended application. Some examples of market acceptance criteria include requirements that an item must --

(90) Have been announced to the public, indicating the manufacturer's commitment to produce the product;

(91) Be commercially available for delivery within a reasonable time;

(92) Be off-the-shelf, meaning that the products offered do not require substantial modification;

(93) Be in current production, meaning that the item is no longer in the design phase but is started on assembly line production with the expectation that such production will continue;

(94) Be state-of-the-art, meaning that the product is the offeror's latest version of that product;

(95) Have been previously sold to commercial or other customers, sometimes for a specified period of time or with a user base of a specified number;

(96) Have met specified reliability and performance requirements;

(97) Be supported by specified maintenance and logistics arrangements;

(98) Be the successor to a product having a specified history of sales and performance; or

(99) Meet some combinations of the above criteria.

11.201 Identification and availability of specifications.

(90) Contracting personnel are not authorized to make any change in the unit of issue on stock buys without approval from either technical or supply personnel in accordance with local procedures.

SUBPART 11.3 - ACQUIRING OTHER THAN NEW MATERIAL, FORMER GOVERNMENT  
SURPLUS PROPERTY, AND RESIDUAL INVENTORY

11.302 Solicitation provisions and contract clauses.

(b) When the provision at FAR 52.211-5 *is* used in solicitations permitting offers of surplus materials, the clause at 52.211-9000, Surplus Material, shall also be used. ***In addition, the provision at 52.211-9003 shall be included to advise offerors of the savings thresholds their offers must meet before their offers of surplus material are evaluated. DSCs shall establish procedures such that they will evaluate offers of surplus material when the savings meet the savings threshold stated in the provision, and there is a reasonable expectation that the offer of surplus material may be in line for award.*** In order to avoid the establishment of dual standards, when offers of surplus property are permitted, warranty provisions applied must be applied to all contractors whether manufacturers or dealers and whether or not surplus material is offered. Therefore, a warranty clause as prescribed in FAR Subpart 46.7 or DFARS Subpart 246.7 must also be incorporated in the solicitation whenever the above clauses are used and use of a warranty provision is desired.

(90) When the contracting officer considers it appropriate to obtain documentation to confirm that the market acceptance criteria have been met, in addition to any documentation that may be specified in the requirements document, the contracting office may use the provision at 52.211-9001, Market Acceptance.

SUBPART 11.4 - DELIVERY OR PERFORMANCE SCHEDULES

11.401 General.

Absent locally coordinated operating procedures, contracting personnel will not change production leadtimes or customer required delivery dates without prior coordination with the inventory manager and industrial specialist.

11.401-90 Extended contracting delays.

The contracting office shall immediately notify the item manager when extended delays in contract award are anticipated and, when possible, also advise of the length of delay in the proposed delivery schedule.

SUBPART 11.5 - LIQUIDATED DAMAGES

11.502 Policy.

(d) Recommendations concerning the remission of liquidated damages shall be transmitted to the General Counsel.

SUBPART 11.6 - PRIORITIES AND ALLOCATIONS

11.602 General.

(a)(90) Executive Order (E.O.) 12742 implements Section 468 of the Selective Service Act (SSA). It allows for placing orders for the prompt delivery of articles or materials in support of the Armed Forces. The E.O. provides that all regulations and delegations made under the Defense Production Act (DPA), which includes the Defense Priorities and Allocations System (DPAS) regulation, remain in effect. Therefore, whenever the DPA lapses, the DPAS will continue in effect under authority of the E.O. and the SSA as the basis for rating DoD contracts to insure preferential scheduling and priority treatment by contractors.

(c)(90) The rating authority continued in effect under E.O. 12742 also extends to food resources in support of troops in accordance with the Memorandum of Understanding between the Departments of Agriculture and Commerce and the determination made by the Under Secretary of Defense for Acquisition and Technology.

11.603-90 Procedures for placement of contracts when normal solicitations fail.

(a) The following procedures, in consonance with the DPAS regulation (15 CFR 700), shall apply when industry fails to adequately respond to solicitations for supplies to support the Military Services as prescribed in FAR 11.603.

(1) Reserved.

(2) To be reasonably certain that the companies upon which rated orders are placed unilaterally may not legally reject the orders (see DPAS 15 CFR 700.13(b) and (c)) and to assure that the placement of a rated order is practicable, unilateral rated orders shall comply with the following:

A rated order shall not be issued unilaterally to a company when a reasonable doubt exists as to its capability to produce an item, or a like item, until a plant survey has been made by a Defense Contract Management Command (DCMC) field office and that office has determined that the company has the production capability, the financial capability, and the facilities to produce the item. The refusal of a company to permit such a survey, however, shall not alone be the basis for issuing a rated order. The decision in such cases will be based on the best information obtainable by DCMC and the contracting office.

(3) The issuance of a unilateral rated order is a "forced" action which may generate complaints or objections from suppliers. Therefore, extreme caution is required to assure equitable distribution of the orders to selected individual firms. Within the limits prescribed in subparagraph (2) above, the quantity to be included in each rated order and the number of companies to be selected shall be determined in accordance with the following criteria:

(i) When a production line must be established to produce the specific item, the rated order quantity shall not be less than a minimum economical production run.

(ii) When the total contract requirement represents a minimum economical production run for only one (or a few) of the capable producers, the rated order(s) shall be issued to the company(ies) considered the most capable and on which the impact on production will be minimal.

(iii) When there are a large number of companies capable of producing the total required quantity, the most qualified companies shall be selected. The quantity placed with each company shall not exceed 20 percent of each company's total capability to produce a like or similar item during the production period, until the total quantity is covered. The 20 percent restriction may be exceeded when a company so desires. (Note: The 20 percent is applied against the company's total capability to produce the like or similar item, irrespective of whether the company has multiplant or single plant production facilities.)

(iv) When there are relatively few companies capable of producing the items, the total quantity shall be allocated among all qualified producers, regardless of the percentage of capacity utilized.

(v) Every effort shall be made in each case to spread the requirement in such a way as to minimize the overall impact on the affected industry.

(4) The price data for these unilateral rated orders shall be developed using the latest published industry pricing data or the last award price, adjusted as necessary to reflect current market pricing conditions. Further adjustment of these prices may be necessary to meet a quality producer's standards, or to provide for a differential for a job shop's cost as compared with mass production costs. It should be noted that when pricing rated orders, the applicable requirements of FAR and the DFARS pertaining to cost or pricing data shall be followed.

(5) Reserved.

(6) Requirements for contract review and approval by the Executive Directorate, Procurement **Management**.

(i) The requirements of 1.690-6 for review and approval prior to award of certain type contracts are waived for contracts resulting from unilateral rated orders. However, such contracts for which preaward review has been waived shall be submitted to HQ DLA for a postaward review when called for by MMPPB.

(ii) Letter contracts still require authorization by HQ DLA in accordance with 1.690 -6(g).

(7) A copy of all unilateral rated orders will be forwarded to HQ DLA, ATTN: MMPON, at time of issue.

(8) There may be instances when suppliers refuse to accept unilateral rated orders. In such situations, negotiations shall be conducted at the level of the chief of the contracting office to determine whether some accommodation can be reached. If the contracting office agrees that a contract requirement is inconsistent with the contractor's regularly established terms of sale but there is no authority to waive the requirement, the matter will be referred to HQ DLA, ATTN: MMPON, for resolution. If, in the judgment of the contracting office, the requirement is consistent with the contractor's regularly established terms of sale, but the parties disagree on the terms and conditions of the unilateral rated order (including failure to agree on a reasonable price), the contractor's written refusal, citing reasons, together with a completed

DoC Form ITA-999, Request for Special Priorities Assistance, shall be forwarded through established priorities assistance channels to HQ DLA, ATTN: MMPON, for action. It is emphasized that DoC will not direct any company to accept a rated order when the company has proper grounds for refusing the order. Each DLA contracting office will assure that the actions and determinations described, including a physical plant survey (for exception see subparagraph (2) above) by a DCMC field office, have been accomplished prior to requesting HQ DLA sponsorship of a request for DoC special priorities assistance.

11.604 Solicitation provision and contract clause.

(90) Notice to Offerors. The clause at 52.211-9002, Priority Rating, shall be included in all solicitations distributed to industry for contracting action except for items excluded under 15 CFR 700.18(b).

#### SUBPART 11.7 - VARIATION IN QUANTITY

11.701 Supply contracts.

(a) DFSC is authorized to deviate from the requirements at FAR 11.701(a) and (b) and the clause at FAR 52.211-16. They may express the permissible variation in quantity of supplies as a rail car, not a percentage.

11.701-90 Procedure for closing contracts with inconsequential amounts undelivered.

The contracting officer is authorized on a case-by-case basis to consider a contract completed when an inconsequential amount not falling within the variation in quantity clause remains undelivered or, in the case of brand name subsistence or less than carload lots (LCL) of perishable subsistence items, the undelivered amount is no longer required by the using activity, provided all of the following conditions exist:

(a) Provision for payment is on a unit price basis, and the contractor advises that no further deliveries will be made;

(b) Payment is made for the units actually received;

(c) The undelivered portion is inconsequential, or in the case of brand name subsistence or LCL perishable subsistence items, the undelivered amount is no longer required by the using activity, and the cost of executing a supplemental agreement (including, but not limited to, taking termination action) is excessive in relation to the benefits to the Government from such action; and

(d) The contracting officer includes in the file a memorandum stating that no rights of the Government are being waived by this procedure, and a termination for default is not warranted. The contracting officer shall execute and distribute an SF 30, Amendment of Solicitation/Modification of Contract, as an administrative change to the contract to deobligate funds. The change shall indicate that the above criteria have been met and the contract is considered complete, and shall reference the contractor's communication which advised that no further deliveries will be made.

11.703 Contract clause.

(a) Defense Fuel Supply Center (DFSC) is authorized to use DFSC clause 52.211-9F16, Variation in Quantity (DEC 1995) (DEVIATION), in lieu of FAR clause 52.211-16. Variation in Quantity, in fixed-price, indefinite-delivery type solicitations and contracts for coal. See 11.701(a).

(b) Delivery of Excess Quantities of \$250 or Less. Unless there is a valid reason to the contrary, the clause set forth in FAR 52.211-17 shall be included in all contracts, purchase orders, and Blanket Purchase Agreements.